

C-5148

**AMENDMENT NO. ONE TO
PROFESSIONAL SERVICES AGREEMENT
WITH WENDY MARSHALL DBA MESSENGER COMPANY FOR
BALBOA VILLAGE BUSINESS IMPROVEMENT DISTRICT WEBSITE
REDESIGN**

THIS AMENDMENT NO. ONE TO PROFESSIONAL SERVICES AGREEMENT ("Agreement") is made and entered into as of the 13th day of ~~October~~^{November}, 2012, by and between the CITY OF NEWPORT BEACH, a California municipal corporation and charter city ("City"), and WENDY MARSHALL, a sole proprietor doing business as ("DBA") MESSENGER COMPANY ("Consultant"), whose address is 250 Newport Center Drive, Suite 200, Newport Beach, CA 92660, and is made with reference to the following:

RECITALS

- A. On May 30, 2012 ("Effective Date"), City and Consultant entered into a Professional Services Agreement ("Agreement") for the redesign, development and maintenance of an improved website for the Balboa Village Business Improvement District ("Project").
- B. City desires to enter into this Amendment No. One to extend the term of the Agreement to June 30, 2013, increase the total compensation, and update the insurance requirements.
- C. City and Consultant mutually desire to amend this Agreement, as provided below.

NOW, THEREFORE, it is mutually agreed by and between the undersigned parties as follows:

1. TERM

Section 1 of the Agreement shall be amended in its entirety and replaced with the following: The term of the Agreement shall commence on the Effective Date, and shall terminate on June 30, 2013, unless terminated earlier as set forth herein.

2. COMPENSATION TO CONSULTANT

Section 4.1 of the Agreement shall be amended in its entirety and replaced with the following: City shall pay Consultant for the Services on a time and expense not-to-exceed basis in accordance with the provisions of this Section and the Scope of Services and Billing Rates attached as Exhibit A and incorporated herein by reference. Exhibit A of the Agreement and Exhibit A of Amendment No. One shall collectively be known as "Exhibit A". Consultant's compensation for all Work performed in accordance with this Agreement, including all reimbursable items and subconsultant fees, shall not exceed **Nine Thousand Dollars and No/100 (\$9,000.00)** ("Total Amended Compensation") without prior written authorization from City. No billing rate changes

shall be made during the term of this Agreement without the prior written approval of City.

2.1 The Total Amended Compensation reflects Consultant's additional compensation for services to be performed in accordance with this Amendment No. One in an amount not to exceed Three Thousand Dollars and No/100 (\$3,000.00).

3. INSURANCE

Section 14 of the Agreement shall be amended in its entirety and replaced with the following: Without limiting Consultant's indemnification of City, and prior to commencement of Work, Consultant shall obtain, provide and maintain at its own expense during the term of this Agreement or for other periods as specified in this Agreement, policies of insurance of the type, amounts, terms and conditions described in the Insurance Requirements attached hereto as Exhibit B, and incorporated herein by reference.

4. INTEGRATED CONTRACT

Except as expressly modified herein, all other provisions, terms, and covenants set forth in the Agreement, as amended shall remain unchanged and shall be in full force and effect.

[SIGNATURES ON NEXT PAGE]

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed on the dates written below.

**APPROVED AS TO FORM:
CITY ATTORNEY'S OFFICE**

Date: 10/25/12

By: [Signature]
Aaron C. Harp
City Attorney mb 10-25

**CITY OF NEWPORT BEACH,
a California municipal corporation**

Date: 11/1/12

By: [Signature]
Dave Kiff
City Manager

ATTEST:

Date: 11-13-12

By: [Signature]
Leilani I. Brown
City Clerk

**CONSULTANT: WENDY MARSHALL,
a sole proprietor**

Date: _____

By: [Signature]
Wendy Marshall
Owner



[END OF SIGNATURES]

Attachments: Exhibit A – Scope of Services and Billing Rates
Exhibit B – Insurance Requirements

EXHIBIT A
SCOPE OF SERVICES AND BILLING RATES

1 | Objectives and Specifications

Our proposed includes the following for balboavillage.com:

- Managed Web Hosting
- Complete Website Maintenance, which includes: content updates, relevant plugin updates, and overall reliable website management (5 hours/month)
- Ongoing Search Engine Optimization (SEO) maintenance and on-going Keyword Implementation to improve Google Search Ranking, online presence, and overall website traffic.
- Optional Project and Task Management Services through Basecamp (or email if preferable) to track milestones due dates and improve collaboration.
- Installation of Google Analytics and Webmaster tools to better track website visits and effectiveness.

2 | Scope Activities

On a monthly basis, we will perform all of the tasks outlined above, as needed or requested by the client. In the event that monthly maintenance exceeds 5 hours, any additional work needed will be billed at \$85/hour, as approved by the client submission and approval of a Project Change Request (PCR) form.

Note: Managed Hosting (this plan) does not include design edits/updates to website.

3 | Service Pricing

- Complete Website Maintenance (up to 5 hours)
 - Cost: \$300/month
- Additional Support and Maintenance beyond 5 hours (as approved by client by Project Change Request (PCR) form)
 - Cost: Project-by-project basis

4 | Contract Term

- Service beginning September 1, 2012 to June 30, 2013

Acceptance | Fee & Payment Structure

The cost identified above represents Messenger Co.'s professional fees for ongoing monthly Website Maintenance. Balboa Business Improvement District will be billed on a monthly basis, which is due upon receipt. All work performed by Messenger Co. is supplied under the Terms & Conditions listed below.

Balboa Business Improvement District Acceptance

Messenger Co. Authorized Acceptance

By: _____
Title: _____

By: Wendy S. Messenger
Title: Owner

EXHIBIT B

1. INSURANCE REQUIREMENTS – PROFESSIONAL SERVICES

1.1 Provision of Insurance. Without limiting Consultant's indemnification of City, and prior to commencement of Work, Consultant shall obtain, provide and maintain at its own expense during the term of this Agreement, policies of insurance of the type and amounts described below and in a form satisfactory to City. Consultant agrees to provide insurance in accordance with requirements set forth here. If Consultant uses existing coverage to comply and that coverage does not meet these requirements, Consultant agrees to amend, supplement or endorse the existing coverage.

1.2 Acceptable Insurers. All insurance policies shall be issued by an insurance company currently authorized by the Insurance Commissioner to transact business of insurance in the State of California, with an assigned policyholders' Rating of A- (or higher) and Financial Size Category Class VII (or larger) in accordance with the latest edition of Best's Key Rating Guide, unless otherwise approved by the City's Risk Manager.

1.3 Coverage Requirements.

1.3.1 Workers' Compensation Insurance. Consultant shall maintain Workers' Compensation Insurance, statutory limits, and Employer's Liability Insurance with limits of at least one million dollars (\$1,000,000) each accident for bodily injury by accident and each employee for bodily injury by disease in accordance with the laws of the State of California, Section 3700 of the Labor Code.

1.3.1.1 Consultant shall submit to City, along with the certificate of insurance, a Waiver of Subrogation endorsement in favor of City, its officers, agents, employees and volunteers.

1.3.2 General Liability Insurance. Consultant shall maintain commercial general liability insurance, and if necessary umbrella liability insurance, with coverage at least as broad as provided by Insurance Services Office form CG 00 01, in an amount not less than one million dollars (\$1,000,000) per occurrence, two million dollars (\$2,000,000) general aggregate. The policy shall cover liability arising from premises, operations, products-completed operations, personal and advertising injury, and liability assumed under an insured contract (including the tort liability of another assumed in a business contract) with no endorsement or modification limiting the scope of coverage for liability assumed under a contract.

1.3.3 Automobile Liability Insurance. Consultant shall maintain automobile insurance at least as broad as Insurance Services Office form CA 00 01 covering bodily injury and property damage for all activities of the Consultant arising out of or in connection with Work to be performed under this Agreement, including coverage for any owned, hired, non-owned or rented vehicles, in an amount not less than one million dollars (\$1,000,000) combined single limit each accident.

1.3.4 Professional Liability (Errors & Omissions) Insurance. Consultant shall maintain professional liability insurance that covers the Services to be performed in connection with this Agreement, in the minimum amount of one million dollars (\$1,000,000) per claim and in the aggregate. Any policy inception date, continuity date, or retroactive date must be before the effective date of this agreement and Consultant agrees to maintain continuous coverage through a period no less than three years after completion of the services required by this agreement.

1.4 Other Insurance Requirements. The policies are to contain, or be endorsed to contain, the following provisions:

1.4.1 Waiver of Subrogation. All insurance coverage maintained or procured pursuant to this agreement shall be endorsed to waive subrogation against City, its elected or appointed officers, agents, officials, employees and volunteers or shall specifically allow Consultant or others providing insurance evidence in compliance with these requirements to waive their right of recovery prior to a loss. Consultant hereby waives its own right of recovery against City, and shall require similar written express waivers from each of its subconsultants.

1.4.2 Additional Insured Status. All liability policies including general liability, excess liability, pollution liability, and automobile liability, but not including professional liability, shall provide or be endorsed to provide that City and its officers, officials, employees, and agents shall be included as insureds under such policies.

1.4.3 Primary and Non Contributory. All liability coverage shall apply on a primary basis and shall not require contribution from any insurance or self-insurance maintained by City.

1.4.4 Notice of Cancellation. All policies shall provide City with thirty (30) days notice of cancellation (except for nonpayment for which ten (10) days notice is required) or nonrenewal of coverage for each required coverage.

1.5 Additional Agreements Between the Parties. The parties hereby agree to the following:

1.5.1 Evidence of Insurance. Consultant shall provide certificates of insurance to City as evidence of the insurance coverage required herein, along with a waiver of subrogation endorsement for workers' compensation and other endorsements as specified herein for each coverage. Insurance certificates and endorsement must be approved by City's Risk Manager prior to commencement of performance. Current certification of insurance shall be kept on file with City at all times during the term of this Agreement. City reserves the right to require complete, certified copies of all required insurance policies, at any time.

1.5.2 City's Right to Revise Requirements. The City reserves the right at any time during the term of the Agreement to change the amounts and types of insurance required by giving the Consultant sixty (60) days advance written notice of

such change. If such change results in substantial additional cost to the Consultant, the City and Consultant may renegotiate Consultant's compensation.

1.5.3 Enforcement of Agreement Provisions. Consultant acknowledges and agrees that any actual or alleged failure on the part of the City to inform Consultant of non-compliance with any requirement imposes no additional obligations on the City nor does it waive any rights hereunder.

1.5.4 Requirements not Limiting. Requirements of specific coverage features or limits contained in this Section are not intended as a limitation on coverage, limits or other requirements, or a waiver of any coverage normally provided by any insurance. Specific reference to a given coverage feature is for purposes of clarification only as it pertains to a given issue and is not intended by any party or insured to be all inclusive, or to the exclusion of other coverage, or a waiver of any type.

1.5.5 Self-insured Retentions. Any self-insured retentions must be declared to and approved by City. City reserves the right to require that self-insured retentions be eliminated, lowered, or replaced by a deductible. Self-insurance will not be considered to comply with these requirements unless approved by City.

1.5.6 City Remedies for Non Compliance If Consultant or any subconsultant fails to provide and maintain insurance as required herein, then City shall have the right but not the obligation, to purchase such insurance, to terminate this agreement, or to suspend Consultant's right to proceed until proper evidence of insurance is provided. Any amounts paid by City shall, at City's sole option, be deducted from amounts payable to Consultant or reimbursed by Consultant upon demand.

1.5.7 Timely Notice of Claims. Consultant shall give City prompt and timely notice of claims made or suits instituted that arise out of or result from Consultant's performance under this Agreement, and that involve or may involve coverage under any of the required liability policies.

1.5.8 Consultant's Insurance. Consultant shall also procure and maintain, at its own cost and expense, any additional kinds of insurance, which in its own judgment may be necessary for its proper protection and prosecution of the Work.

C-5146

**PROFESSIONAL SERVICES AGREEMENT WITH
MESSENGER COMPANY
FOR
BALBOA VILLAGE BUSINESS IMPROVEMENT DISTRICT WEBSITE REDESIGN**

THIS AGREEMENT FOR PROFESSIONAL SERVICES ("Agreement") is made and entered into as of this 30th day of MAY, 2012 by and between the CITY OF NEWPORT BEACH, a California Municipal Corporation ("City"), and, **WENDY MARSHALL**, a sole proprietor doing business as ("DBA") **MESSENGER COMPANY** ("Consultant"), whose address is 250 Newport Center Drive, Suite 200, Newport Beach, CA 92660 and is made with reference to the following:

RECITALS

- A. City is a municipal corporation duly organized and validly existing under the laws of the State of California with the power to carry on its business as it is now being conducted under the statutes of the State of California and the Charter of City.
- B. City is seeking an enhanced online presence for marketing the Balboa Village Business Improvement District.
- C. City desires to engage Consultant to redesign, develop and maintain an improved website for the Balboa Village Business Improvement District ("Project").
- D. Consultant possesses the skill, experience, ability, background, certification and knowledge to provide the services described in this Agreement.
- E. The principal member of Consultant for purposes of Project shall be Wendy Marshall.
- F. City has solicited and received a proposal from Consultant, has reviewed the previous experience and evaluated the expertise of Consultant, and desires to retain Consultant to render professional services under the terms and conditions set forth in this Agreement.

NOW, THEREFORE, it is mutually agreed by and between the undersigned parties as follows:

1. TERM

The term of this Agreement shall commence on the above written date, and shall terminate on December 31, 2012 unless terminated earlier as set forth herein.

2. SERVICES TO BE PERFORMED

City and Consultant acknowledge that the above Recitals are true and correct and are hereby incorporated by reference. Consultant shall diligently perform all the services described in the Scope of Services attached hereto as Exhibit A and incorporated

herein by reference ("Work" or "Services"). The City may elect to delete certain tasks of the Scope of Services at its sole discretion.

3. TIME OF PERFORMANCE

3.1 Time is of the essence in the performance of Services under this Agreement and Consultant shall perform the Services in accordance with the schedule included in Exhibit A. The failure by Consultant to strictly adhere to the schedule may result in termination of this Agreement by City.

3.1.1 Notwithstanding the foregoing, Consultant shall not be responsible for delays due to causes beyond Consultant's reasonable control. However, in the case of any such delay in the Services to be provided for the Project, each party hereby agrees to provide notice to the other party so that all delays can be addressed.

3.2 Consultant shall submit all requests for extensions of time for performance in writing to the Project Administrator (as defined in Section 6 below) not later than ten (10) calendar days after the start of the condition that purportedly causes a delay. The Project Administrator shall review all such requests and may grant reasonable time extensions for unforeseeable delays that are beyond Consultant's control.

3.3 For all time periods not specifically set forth herein, Consultant shall respond in the most expedient and appropriate manner under the circumstances, by either telephone, fax, hand-delivery or mail.

4. COMPENSATION TO CONSULTANT

4.1 City shall pay Consultant for the Services on a time and expense not-to-exceed basis in accordance with the provisions of this Section and the Schedule of Billing Rates attached hereto as Exhibit B and incorporated herein by reference. Consultant's compensation for all Work performed in accordance with this Agreement, including all reimbursable items and subconsultant fees, shall not exceed **Six Thousand Dollars and no/100 (\$6,000.00)** without prior written authorization from City. No billing rate changes shall be made during the term of this Agreement without the prior written approval of City.

4.2 Consultant shall submit invoices to City describing the Work performed. Consultant's bills shall include the name of the person who performed the Work, a brief description of the Services performed and/or the specific task in the Scope of Services to which it relates, the date the Services were performed, the number of hours spent on all Work billed on an hourly basis, and a description of any reimbursable expenditures. City shall pay Consultant no later than thirty (30) days after approval of the invoice by City staff.

4.3 City shall reimburse Consultant only for those costs or expenses specifically approved in this Agreement, or specifically approved in writing in advance by City. Unless otherwise approved, such costs shall be limited and include nothing more than the following costs incurred by Consultant:

4.3.1 The actual costs of subconsultants for performance of any of the Services that Consultant agrees to render pursuant to this Agreement, which have been approved in advance by City and awarded in accordance with this Agreement.

4.3.2 Approved reproduction charges.

4.3.3 Actual costs and/or other costs and/or payments specifically authorized in advance in writing and incurred by Consultant in the performance of this Agreement.

4.4 Consultant shall not receive any compensation for Extra Work performed without the prior written authorization of City. As used herein, "Extra Work" means any Work that is determined by City to be necessary for the proper completion of the Project, but which is not included within the Scope of Services and which the parties did not reasonably anticipate would be necessary at the execution of this Agreement. Compensation for any authorized Extra Work shall be paid in accordance with the Schedule of Billing Rates as set forth in Exhibit A.

4.5 Notwithstanding any other provision of this Agreement, when payments made by City equal 90% of the maximum fee provided for in this Agreement, no further payments shall be made until City has accepted the final Work under this Agreement

5. PROJECT MANAGER

5.1 Consultant shall designate a Project Manager, who shall coordinate all phases of the Project. This Project Manager shall be available to City at all reasonable times during the Agreement term. Consultant has designated **Wendy Marshall** to be its Project Manager. Consultant shall not remove or reassign the Project Manager or any personnel listed in Exhibit A or assign any new or replacement personnel to the Project without the prior written consent of City. City's approval shall not be unreasonably withheld with respect to the removal or assignment of non-key personnel.

5.2 Consultant, at the sole discretion of City, shall remove from the Project any of its personnel assigned to the performance of Services upon written request of City. Consultant warrants that it will continuously furnish the necessary personnel to complete the Project on a timely basis as contemplated by this Agreement.

6. ADMINISTRATION

This Agreement will be administered by the **City Manager's Office**. **Tara Finnigan, Public Information Manager** or his/her designee, shall be the Project Administrator and shall have the authority to act for City under this Agreement. The Project Administrator or his/her authorized representative shall represent City in all matters pertaining to the Services to be rendered pursuant to this Agreement.

7. CITY'S RESPONSIBILITIES

7.1 In order to assist Consultant in the execution of its responsibilities under this Agreement, City agrees to, where applicable:

7.1.1 Provide access to, and upon request of Consultant, one copy of all existing relevant information on file at City. City will provide all such materials in a timely manner so as not to cause delays in Consultant's Work schedule.

7.1.2 Provide blueprinting and other Services through City's reproduction company for bid documents. Consultant will be required to coordinate the required bid documents with City's reproduction company. All other reproduction will be the responsibility of Consultant and as defined above.

7.1.3 Provide usable life of facilities criteria and information with regards to new facilities or facilities to be rehabilitated.

8. STANDARD OF CARE

8.1 All of the Services shall be performed by Consultant or under Consultant's supervision. Consultant represents that it possesses the professional and technical personnel required to perform the Services required by this Agreement, and that it will perform all Services in a manner commensurate with community professional standards. All Services shall be performed by qualified and experienced personnel who are not employed by City, nor have any contractual relationship with City. By delivery of completed Work, Consultant certifies that the Work conforms to the requirements of this Agreement and all applicable federal, state and local laws and the professional standard of care.

8.2 Consultant represents and warrants to City that it has, shall obtain, and shall keep in full force in effect during the term hereof, at its sole cost and expense, all licenses, permits, qualifications, insurance and approvals of whatsoever nature that is legally required of Consultant to practice its profession. Consultant shall maintain a City of Newport Beach business license during the term of this Agreement.

8.3 Consultant shall not be responsible for delay, nor shall Consultant be responsible for damages or be in default or deemed to be in default by reason of strikes, lockouts, accidents, or acts of God, or the failure of City to furnish timely information or to approve or disapprove Consultant's Work promptly, or delay or faulty performance by City, contractors, or governmental agencies.

9. HOLD HARMLESS

9.1 To the fullest extent permitted by law, Consultant shall indemnify, defend and hold harmless City, its City Council, boards and commissions, officers, agents, volunteers, and employees (collectively, the "Indemnified Parties") from and against any and all claims (including, without limitation, claims for bodily injury, death or damage to property), demands, obligations, damages, actions, causes of action, suits, losses, judgments, fines, penalties, liabilities, costs and expenses (including, without limitation, attorney's fees, disbursements and court costs) of every kind and nature whatsoever (individually, a Claim; collectively, "Claims"), which may arise from or in any manner relate (directly or indirectly) to any breach of the terms and conditions of this Agreement, any Work performed or Services provided under this Agreement including, without limitation, defects in workmanship or materials or Consultant's presence or activities conducted on the Project (including the negligent and/or willful acts, errors

and/or omissions of Consultant, its principals, officers, agents, employees, vendors, suppliers, subconsultants, subcontractors, anyone employed directly or indirectly by any of them or for whose acts they may be liable or any or all of them).

9.2 Notwithstanding the foregoing, nothing herein shall be construed to require Consultant to indemnify the Indemnified Parties from any Claim arising from the sole negligence or willful misconduct of the Indemnified Parties. Nothing in this indemnity shall be construed as authorizing any award of attorney's fees in any action on or to enforce the terms of this Agreement. This indemnity shall apply to all claims and liability regardless of whether any insurance policies are applicable. The policy limits do not act as a limitation upon the amount of indemnification to be provided by the Consultant.

10. INDEPENDENT CONTRACTOR

It is understood that City retains Consultant on an independent contractor basis and Consultant is not an agent or employee of City. The manner and means of conducting the Work are under the control of Consultant, except to the extent they are limited by statute, rule or regulation and the expressed terms of this Agreement. Nothing in this Agreement shall be deemed to constitute approval for Consultant or any of Consultant's employees or agents, to be the agents or employees of City. Consultant shall have the responsibility for and control over the means of performing the Work, provided that Consultant is in compliance with the terms of this Agreement. Anything in this Agreement that may appear to give City the right to direct Consultant as to the details of the performance or to exercise a measure of control over Consultant shall mean only that Consultant shall follow the desires of City with respect to the results of the Services.

11. COOPERATION

Consultant agrees to work closely and cooperate fully with City's designated Project Administrator and any other agencies that may have jurisdiction or interest in the Work to be performed. City agrees to cooperate with the Consultant on the Project.

12. CITY POLICY

Consultant shall discuss and review all matters relating to policy and Project direction with City's Project Administrator in advance of all critical decision points in order to ensure the Project proceeds in a manner consistent with City goals and policies.

13. PROGRESS

Consultant is responsible for keeping the Project Administrator and/or his/her duly authorized designee informed on a regular basis regarding the status and progress of the Project, activities performed and planned, and any meetings that have been scheduled or are desired.

14. INSURANCE

14.1 Without limiting Consultant's indemnification of City, and prior to commencement of Work, Consultant shall obtain, provide and maintain at its own

expense during the term of this Agreement, policies of insurance of the type and amounts described below and in a form satisfactory to City.

14.2 Proof of Insurance. Consultant shall provide certificates of insurance to City as evidence of the insurance coverage required herein, along with a waiver of subrogation endorsement for workers' compensation. Insurance certificates and endorsement must be approved by City's Risk Manager prior to commencement of performance. Current certification of insurance shall be kept on file with City at all times during the term of this Agreement. City reserves the right to require complete, certified copies of all required insurance policies, at any time.

14.2.1 Consultant shall procure and maintain for the duration of the Agreement insurance against claims for injuries to persons or damages to property, which may arise from or in connection with the performance of the Work hereunder by Consultant, his agents, representatives, employees or subcontractors. The cost of such insurance shall be included in Consultant's bid.

14.3 Acceptable Insurers. All insurance policies shall be issued by an insurance company currently authorized by the Insurance Commissioner to transact business of insurance in the State of California, with an assigned policyholders' Rating of A- (or higher) and Financial Size Category Class VII (or larger) in accordance with the latest edition of Best's Key Rating Guide, unless otherwise approved by the City's Risk Manager.

14.4 Coverage Requirements.

14.4.1 Workers' Compensation Coverage. Consultant shall maintain Workers' Compensation Insurance (Statutory Limits) and Employer's Liability Insurance (with limits of at least one million dollars (\$1,000,000)) for Consultant's employees in accordance with the laws of the State of California, Section 3700 of the Labor Code. In addition, Consultant shall require each subconsultant to similarly maintain Workers' Compensation Insurance and Employer's Liability Insurance in accordance with the laws of the State of California, Section 3700 for all of the subcontractor's employees.

14.4.1.1 Any notice of cancellation or non-renewal of all Workers' Compensation policies must be received by City at least thirty (30) calendar days (ten (10) calendar days written notice of non-payment of premium) prior to such change.

14.4.1.2 Consultant shall submit to City, along with the certificate of insurance, a Waiver of Subrogation endorsement in favor of City, its officers, agents, employees and volunteers.

14.5 General Liability Coverage. Consultant shall maintain commercial general liability insurance in an amount not less than one million dollars (\$1,000,000) per occurrence for bodily injury, personal injury, and property damage, including without limitation, blanket contractual liability.

14.6 Automobile Liability Coverage. Consultant shall maintain automobile insurance covering bodily injury and property damage for all activities of the Consultant

arising out of or in connection with Work to be performed under this Agreement, including coverage for any owned, hired, non-owned or rented vehicles, in an amount not less than one million dollars (\$1,000,000) combined single limit for each accident.

14.7 Professional Liability (Errors & Omissions) Coverage. Consultant shall maintain professional liability insurance that covers the Services to be performed in connection with this Agreement, in the minimum amount of one million dollars (\$1,000,000) limit per claim and in the aggregate.

14.8 Other Insurance Provisions or Requirements.

14.8.1 The policies are to contain, or be endorsed to contain, the following provisions:

14.8.1.1 Waiver of Subrogation. All insurance coverage maintained or procured pursuant to this agreement shall be endorsed to waive subrogation against City, its elected or appointed officers, agents, officials, employees and volunteers or shall specifically allow Consultant or others providing insurance evidence in compliance with these requirements to waive their right of recovery prior to a loss. Consultant hereby waives its own right of recovery against City, and shall require similar written express waivers and insurance clauses from each of its subcontractors. In the event Contractor has no employees requiring Contractor to provide Worker's Compensation insurance, Contractor shall so certify to City in writing prior to City's execution of this Agreement.

14.8.1.2 Enforcement of Agreement Provisions. Consultant acknowledges and agrees that any actual or alleged failure on the part of the City to inform Consultant of non-compliance with any requirement imposes no additional obligations on the City nor does it waive any rights hereunder.

14.8.1.3 Requirements not Limiting. Requirements of specific coverage features or limits contained in this Section are not intended as a limitation on coverage, limits or other requirements, or a waiver of any coverage normally provided by any insurance. Specific reference to a given coverage feature is for purposes of clarification only as it pertains to a given issue and is not intended by any party or insured to be all inclusive, or to the exclusion of other coverage, or a waiver of any type.

14.8.1.4 Notice of Cancellation. Consultant agrees to oblige its insurance agent or broker and insurers to provide to City with thirty (30) days notice of cancellation (except for nonpayment for which ten (10) days notice is required) or nonrenewal of coverage for each required coverage.

14.9 Timely Notice of Claims. Consultant shall give City prompt and timely notice of claims made or suits instituted that arise out of or result from Consultant's performance under this Agreement.

14.10 Additional Insurance. Consultant shall also procure and maintain, at its own cost and expense, any additional kinds of insurance, which in its own judgment may be necessary for its proper protection and prosecution of the Work.

15. PROHIBITION AGAINST ASSIGNMENTS AND TRANSFERS

Except as specifically authorized under this Agreement, the Services to be provided under this Agreement shall not be assigned, transferred contracted or subcontracted out without the prior written approval of City. Any of the following shall be construed as an assignment: The sale, assignment, transfer or other disposition of any of the issued and outstanding capital stock of Consultant, or of the interest of any general partner or joint venturer or syndicate member or cotenant if Consultant is a partnership or joint-venture or syndicate or cotenancy, which shall result in changing the control of Consultant. Control means fifty percent (50%) or more of the voting power, or twenty-five percent (25%) or more of the assets of the corporation, partnership or joint-venture.

16. SUBCONTRACTING

The parties recognize that a substantial inducement to City for entering into this Agreement is the professional reputation, experience and competence of Consultant. Assignments of any or all rights, duties or obligations of the Consultant under this Agreement will be permitted only with the express written consent of City. Consultant shall not subcontract any portion of the Work to be performed under this Agreement without the prior written authorization of City.

17. OWNERSHIP OF DOCUMENTS

17.1 Each and every report, draft, map, record, plan, document and other writing produced (hereinafter "Documents"), prepared or caused to be prepared by Consultant, its officers, employees, agents and subcontractors, in the course of implementing this Agreement, shall become the exclusive property of City, and City shall have the sole right to use such materials in its discretion without further compensation to Consultant or any other party. Consultant shall, at Consultant's expense, provide such Documents to City upon prior written request.

17.2 Documents, including drawings and specifications, prepared by Consultant pursuant to this Agreement are not intended or represented to be suitable for reuse by City or others on any other project. Any use of completed Documents for other projects and any use of incomplete Documents without specific written authorization from Consultant will be at City's sole risk and without liability to Consultant. Further, any and all liability arising out of changes made to Consultant's deliverables under this Agreement by City or persons other than Consultant is waived against Consultant and City assumes full responsibility for such changes unless City has given Consultant prior notice and has received from Consultant written consent for such changes.

18. CONFIDENTIALITY

All Documents, including drafts, preliminary drawings or plans, notes and communications that result from the Services in this Agreement, shall be kept confidential unless City authorizes in writing the release of information.

19. INTELLECTUAL PROPERTY INDEMNITY

The Consultant shall defend and indemnify City, its agents, officers, representatives and employees against any and all liability, including costs, for infringement of any United States' letters patent, trademark, or copyright infringement, including costs, contained in Consultant's drawings and specifications provided under this Agreement.

20. RECORDS

Consultant shall keep records and invoices in connection with the Work to be performed under this Agreement. Consultant shall maintain complete and accurate records with respect to the costs incurred under this Agreement and any Services, expenditures and disbursements charged to City, for a minimum period of three (3) years, or for any longer period required by law, from the date of final payment to Consultant under this Agreement. All such records and invoices shall be clearly identifiable. Consultant shall allow a representative of City to examine, audit and make transcripts or copies of such records and invoices during regular business hours. Consultant shall allow inspection of all Work, data, Documents, proceedings and activities related to the Agreement for a period of three (3) years from the date of final payment to Consultant under this Agreement.

21. WITHHOLDINGS

City may withhold payment to Consultant of any disputed sums until satisfaction of the dispute with respect to such payment. Such withholding shall not be deemed to constitute a failure to pay according to the terms of this Agreement. Consultant shall not discontinue Work as a result of such withholding. Consultant shall have an immediate right to appeal to the City Manager or his/her designee with respect to such disputed sums. Consultant shall be entitled to receive interest on any withheld sums at the rate of return that City earned on its investments during the time period, from the date of withholding of any amounts found to have been improperly withheld.

22. ERRORS AND OMISSIONS

In the event of errors or omissions that are due to the negligence or professional inexperience of Consultant which result in expense to City greater than what would have resulted if there were not errors or omissions in the Work accomplished by Consultant, the additional design, construction and/or restoration expense shall be borne by Consultant. Nothing in this paragraph is intended to limit City's rights under the law or any other sections of this Agreement.

23. CITY'S RIGHT TO EMPLOY OTHER CONSULTANTS

City reserves the right to employ other Consultants in connection with the Project.

24. CONFLICTS OF INTEREST

24.1 The Consultant or its employees may be subject to the provisions of the California Political Reform Act of 1974 (the "Act"), which (1) requires such persons to disclose any financial interest that may foreseeably be materially affected by the Work

performed under this Agreement, and (2) prohibits such persons from making, or participating in making, decisions that will foreseeably financially affect such interest.

24.2 If subject to the Act, Consultant shall conform to all requirements of the Act. Failure to do so constitutes a material breach and is grounds for immediate termination of this Agreement by City. Consultant shall indemnify and hold harmless City for any and all claims for damages resulting from Consultant's violation of this Section.

25. NOTICES

25.1 All notices, demands, requests or approvals to be given under the terms of this Agreement shall be given in writing, and conclusively shall be deemed served when delivered personally, or on the third business day after the deposit thereof in the United States mail, postage prepaid, first-class mail, addressed as hereinafter provided. All notices, demands, requests or approvals from Consultant to City shall be addressed to City at:

Tara Finnigan, Public Information Manager
City Manager's Office
City of Newport Beach
3300 Newport Boulevard
PO Box 1768
Newport Beach, CA 92658
Phone: 949-644-3031
Fax: 949-644-3020
Email: tfinnigan@newportbeachca.gov

25.2 All notices, demands, requests or approvals from CITY to Consultant shall be addressed to Consultant at:

Wendy Marshall
Messenger Company
250 Newport Center Drive, Suite 200
Newport Beach, CA 92660
Phone: 949-231-8380
Fax: 949-209-0343
Email: wendy@messengermktg.com

26. CLAIMS

The Consultant and the City expressly agree that in addition to any claims filing requirements set forth in the Agreement, the Consultant shall be required to file any claim the Consultant may have against the City in strict conformance with the Tort Claims Act (Government Code sections 900 *et seq.*).

27. TERMINATION

27.1 In the event that either party fails or refuses to perform any of the provisions of this Agreement at the time and in the manner required, that party shall be

deemed in default in the performance of this Agreement. If such default is not cured within a period of two (2) calendar days, or if more than two (2) calendar days are reasonably required to cure the default and the defaulting party fails to give adequate assurance of due performance within two (2) calendar days after receipt of written notice of default, specifying the nature of such default and the steps necessary to cure such default, and thereafter diligently take steps to cure the default, the non-defaulting party may terminate the Agreement forthwith by giving to the defaulting party written notice thereof.

27.2 Notwithstanding the above provisions, City shall have the right, at its sole discretion and without cause, of terminating this Agreement at any time by giving seven (7) calendar days prior written notice to Consultant. In the event of termination under this Section, City shall pay Consultant for Services satisfactorily performed and costs incurred up to the effective date of termination for which Consultant has not been previously paid. On the effective date of termination, Consultant shall deliver to City all reports, Documents and other information developed or accumulated in the performance of this Agreement, whether in draft or final form.

28. STANDARD PROVISIONS

28.1 Compliance With all Laws. Consultant shall at its own cost and expense comply with all statutes, ordinances, regulations and requirements of all governmental entities, including federal, state, county or municipal, whether now in force or hereinafter enacted. In addition, all Work prepared by Consultant shall conform to applicable City, county, state and federal laws, rules, regulations and permit requirements and be subject to approval of the Project Administrator and City.

28.2 Waiver. A waiver by either party of any breach, of any term, covenant or condition contained herein shall not be deemed to be a waiver of any subsequent breach of the same or any other term, covenant or condition contained herein, whether of the same or a different character.

28.3 Integrated Contract. This Agreement represents the full and complete understanding of every kind or nature whatsoever between the parties hereto, and all preliminary negotiations and agreements of whatsoever kind or nature are merged herein. No verbal agreement or implied covenant shall be held to vary the provisions herein.

28.4 Conflicts or Inconsistencies. In the event there are any conflicts or inconsistencies between this Agreement and the Scope of Services or any other attachments attached hereto, the terms of this Agreement shall govern.

28.5 Interpretation. The terms of this Agreement shall be construed in accordance with the meaning of the language used and shall not be construed for or against either party by reason of the authorship of the Agreement or any other rule of construction which might otherwise apply.

28.6 Amendments. This Agreement may be modified or amended only by a written document executed by both Consultant and City and approved as to form by the City Attorney.

28.7 Severability. If any term or portion of this Agreement is held to be invalid, illegal, or otherwise unenforceable by a court of competent jurisdiction, the remaining provisions of this Agreement shall continue in full force and effect.

28.8 Controlling Law And Venue. The laws of the State of California shall govern this Agreement and all matters relating to it and any action brought relating to this Agreement shall be adjudicated in a court of competent jurisdiction in the County of Orange.

28.9 Equal Opportunity Employment. Consultant represents that it is an equal opportunity employer and it shall not discriminate against any subcontractor, employee or applicant for employment because of race, religion, color, national origin, handicap, ancestry, sex or age.

28.10 No Attorney's Fees. In the event of any dispute or legal action arising under this Agreement, the prevailing party shall not be entitled to attorney's fees.

28.11 Counterparts. This Agreement may be executed in two (2) or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument.

[SIGNATURES NEXT PAGE]

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed on the dates written below.

**APPROVED AS TO FORM:
CITY ATTORNEY'S OFFICE**

Date: 5/25/12

By: [Signature]
Aaron C. Harp
City Attorney

ATTEST:

Date: 5-30-12

By: [Signature]
Leilani I. Brown
City Clerk



[END OF SIGNATURES]

**CITY OF NEWPORT BEACH,
A California municipal corporation**

Date: 5/30/12

By: [Signature]
Tara Finnigan
Public Information Manager

**CONSULTANT: WENDY MARSHALL, a
sole proprietor**

Date: 5/29/12

By: [Signature]
Wendy Marshall
Owner

Attachments: Exhibit A – Scope of Services & Billing Rates
Worker's Compensation Exemption

document1 11.29.11

EXHIBIT A
SCOPE OF SERVICES AND BILLING RATES

Project: Balboa Village / **Website**

Prepared For: ***Balboa Village***

Prepared By: Messenger MKTG (Messenger Co.)

Thursday, April 12, 2011

April 12, 2012

Balboa Improvement District,

Thank you for the opportunity to present you with a proposal for the conversion and management of the Balboa Village website. This proposal outlines the scope, deliverables, process and timeline.

A website is an extremely important component in showcasing and displaying the village. The website that *Messenger Web Design + Marketing* is proposing will reflect the most prominent features of the village, visually display the beach, restaurants and area and ultimately generate excitement to residents and visitors.

Messenger specializes in an integrated approach to website and marketing development:

Customized Website Design Messenger's creative team will convert your website to a custom Wordpress website with engaging visuals and an appealing design that will be easy to navigate as a catalyst to drive conversions. The website design will reflect the character and personality of the Village, as well as cater to your target audiences.

Brand Identity and Strategic Positioning Messenger's interactive marketing team understands the importance of using the website as a strategic platform that elevates your marketing and branding message. We will ensure that the content and design of the website are representative of your brand identity and that the messaging is effective by strategically speaking directly to your target audience.

Open Source Platform We utilizes the most up to date open source technologies to create data-driven website structures that provide an efficient and user-friendly experience. As a Wordpress specialists, we employ the most current website technologies in developing your online solution.

We greatly appreciate your time and consideration of our proposal. We understand you have many Website Development and Marketing options and we hope to showcase that our services are among the best solutions available. We look forward to the opportunity of winning your trust and business.

Respectfully,

Wendy Messenger
Owner
Messenger MKTG



1 | **Scope of Work**

Messenger will redesign and develop Balboa Village website. This involves a partial restructuring of the following website, www.balboavillage.com, to update the functionality the current site in order to enhance the user experience, and make content user friendly, easy to find, and allow content updates to be handled internally.

Overall Objectives:

- Redesign and enhance the existing look and feel of the website to be a resourceful, informative, and valuable marketing asset
- Update the navigation and flow of existing site.
- Create a strong call to action such as "Visit"
- Build site to a Wordpress CMS in order for content and image edits to be taken care of internally if desired.
- Improve the search engine visibility and ranking web/internet overall.
- Provide consistent, intuitive navigation so information can be easily found.

Phase I:

- Redesign website
- Search Engine Optimize (SEO)
- Add/Update Google Analytics
- Create a newsletter submit form

Phase II (Additional Proposal to be Provided):

- Strategic Marketing Planning
- Public Relations Campaign
- Premium Search Engine Optimization
- Social Media Marketing Integration

2 | **Scope Activities**

The following activities will be performed, in accordance with the overall process (as outlined in this document) and project deliverables, in order to achieve project goals.

1. Discover
2. Define
3. Architecture
4. Design
5. Development
6. Launch

3 | **Deliverables**

The following deliverables will be developed based on Balboa Village's brand positioning. The goal is to increase awareness and create lead conversions.

- **Website Sitemap** The sitemap is a layout of the site structure and navigation for the whole website.
 - One sitemap will be created and will include one (1) revisions
- **Website Designs**



- One (1) concept will be provided for the Homepage with Two (2) rounds of revisions to create a stronger call to action utilize the HP as "ad" space
- Upon Approval of Homepage, we will redesign one (1) additional subpage to serve as template for the underlying sections; one (1) revisions will be provided
 - Agency will use approved design concept to begin coding/conversion on the website be used for integration into the CMS (Note: Designs will only be done for the above, the balance of the website pages will be populated within the coding/development phase)
 - All remaining pages will then be designed and built out following the same template of the approved concept.
- **Website Development**
 - Build out approved designs, which will include two (2) templates and up to 12 pages (any additional pages and/or templates will be considered outside the project scope).
 - Design comps will be cut up and coded using best practices.
 - Initial templates will be tested for compliance across multiple browsers and Mac and Windows platforms. The testing will include, but not be limited to Internet Explorer v7 and above, Firefox, Safari, and Chrome.
 - Content Management System
 - Wordpress CMS installation and connection to the front end/engagement layer of the site.
 - Database schema and build.
 - Content display of the Homepage will be flexible (controlled by the admin) to an extent.
 - Navigation and Interactive Behaviors
 - Basic Usability Testing
 - Mobile Compliance
 - Basic Search Engine Optimization (SEO)
 - Google Analytics installation
- **Web Hosting**
 - Website hosting and maintenance options are below.
- **Assets / Content**
 - All website content, including images, copywriting and any other graphic elements will be supplied by Balboa Village (Note: Image, Content and Graphic editing is not included within Scope. Should there be a need, a separate proposal will be supplied)
 - Copywriting, proofreading and use of rights managed or royalty free images will be estimated for client's written approval.

4 | Timeline

PHASE	APPROX. TIMELINE
Discovery Project Kickoff Meeting	Week 1
Definition Define Functional Requirements CMS Functionality Review	Week 1
Architecture Site Map UI (User Interface Wireframes) Content Architecture and Development Architecture Presentation Architecture Review, Modifications and Acceptance	Week 2
Design Homepage & 1 Subpage UI Interface Design Image Integration	Week 3 & 4



Design Presentation
Design Review, Modifications and Acceptance

Development

Week 5-9

Server side Coding
Database Development
Content/Image Implementation (WordPress)
Content/Image Instruction (Ecommerce/Shop)
Quality Assurance
Client Presentation
Development Review, Modifications and Acceptance

**This timeline is a rough estimate. If approval is later, then we will need to re-evaluate the timeline of the project. Also, any of the approval dates delayed by client will and could delay the actual launch date by as many days. A more detailed timeline will be developed upon approval.

5 | Investment Summary

Core program

These numbers reflect the combined total of all requested website development tasks for launch. Messenger required a 50% deposit on the commencement of all projects listed above. 25% is due upon design direction approval. 25% is due on beta site approval – prior to go live date.

ONE TIME PROJECT COST

Payment 1: Deposit for Creative and Design Development (50%)	\$2,550
Payment 2: Design Direction Approval (25%)	\$1275
Payment 3: Beta Site Approval (25%)	\$1275
Phase I Investment	\$5,100

MONTHLY COST

Website Hosting and Maintenance	\$45/mo- \$300/mo
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Project Change Request

All fees and costs are estimated based on our understanding of the project. Changes in scope of work and/or project specifications require a revision of the information and submission and approval of a Project Change Request (PCR) form.

Additional Hourly Rates

Hourly rates will apply to future activities outside the scope of this proposal. Since the scope of future activities is currently unknown, each future project will be assessed and estimated on an individual basis. The range for future hourly activities or items requested that are outside the scope of work will be \$75.00-\$200.00, depending on the extent of the activities and the staffing requirements.

Website Hosting/Maintenance

A maintenance agreement based on a retainer is available:

- \$45+ - Integrated Web Hosting, includes: Weekly backups, Unlimited bandwidth, and 10 GB of Space. (Any additional updates will be subject to hourly billing).



Acceptance | Fee & Payment Structure

The project cost identified above represents Messenger Co.'s professional fees for this project. Changes in project scope may cause the project fees to change. A milestone deposit of 50% of the project's one time cost is required. A 25% progress payment is due upon initiation of Development. Final payment is due prior to Messenger releasing domain control of files and launching website. Monthly services are net 15 days from date of receipt of invoice. All work performed by Messenger is supplied under the Terms & Conditions listed below. All professional fees and expenses are in U.S. Funds.

Balboa Village Authorized Acceptance

Messenger Co. Authorized Acceptance

By: _____

By: _____

Title: _____

Title: _____

Acceptance | Terms and Conditions

This AGREEMENT is dated this 8th day of May, 2012 between Balboa Village (the "Customer") and Messenger Co. (Messenger);

The following terms and conditions are provided for our clients' benefit. Please read them carefully and contact us should any questions arise.

Sales Tax: All projects that result in a finished product are subject to applicable tax, which is to be paid by the client. California State Sales Tax Rate will apply.

Revisions: Our fees do not include costs for revisions, defined as client initiated changes, following approval of concepts and deliverables. Revisions outside initial scope will be billed on a per hour basis.

Out-of-Pocket Expenses: Our professional fees do not include out-of-pocket expenses. Should the client request services that require out-of-pocket expenses, such as overnight travel, Messenger, FOLLOWING APPROVAL in advance, will submit all out-of-pocket expenses directly to the Client with a 12% handling fee.

Stock Photography: Messenger will retain rights to all stock images purchased by Messenger under the name of Messenger for any client. Messenger retains the right to reuse any stock images purchased under the name Messenger for other clients and future projects.

Cancellation Fee: In the event a project terminates at any time after this agreement and prior to completion, a reasonable cancellation fee will be charged. According to the payment schedule, all outstanding fees and expenses will be billed to date. Studio fees will be prorated according to the date of cancellation. Ownership of all copyrights and original artwork Messenger shall be retained by Messenger. Ownership of all copyrights, images/photos, and artwork provided to Messenger by Client shall be retained by Client and will be returned to Client upon request.

Standard Ownership Contract: Design - All design work and finished artwork is the property of the client and is delivered upon request. Concepts, illustrations, photography and deliverables not selected by the client remain property of Messenger unless otherwise arranged.

Additional Costs: Client will receive invoices for costs outside of the scope of this agreement. These invoices are payable upon receipt. Messenger will advise Client of costs to be incurred for services considered outside the scope of this agreement prior to commencing work and Client will submit, in writing, their approval to proceed.

Payment Schedule: All invoices are due upon receipt. The grant of any license or right of copyright is conditioned on receipt of full payment. Payment schedule is to be paid in increments of a 50% deposit, 25% upon approval of concept design and 25% due upon completion on all project work. Projects not approved or completed within contractual timeline due to failure to supply content or approval within 30 days of request may still be billed.

Warranty of Originality: Messenger warrants and represents that, to the best of our knowledge, the work assigned hereunder is original and has not been previously published or that consent to use has been obtained on an unlimited basis; that all work or portions thereof obtained through the undersigned from third parties is original or, if previously published, that consent to use has been obtained on an unlimited basis.

Limitation of Liability: Both parties agree not hold either party or their employees liable for any incidental or consequential damages that arise from either parties' failure to perform any aspect of the Project in a timely manner, regardless of whether such failure was caused by negligent acts or omissions of either parties' employees or business partners.

Trademarks, Registration, Copyright Infringement – Limited Liability: Client agrees that it shall not hold Messenger or employees liable for any registered trademark and or copyright infringement. While Messenger will work diligently to not violate any registered trademarks or copyright material, the Client assumes responsibility for any disputes with third parties regarding the aforementioned.



**CERTIFICATE OF EXEMPTION FROM
WORKERS' COMPENSATION INSURANCE**

CITY OF NEWPORT BEACH

CERTIFICATE OF EXEMPTION FROM WORKERS' COMPENSATION INSURANCE

I hereby certify that in the performance of the work for which this Agreement is entered into, I shall not employ any person in any manner so as to become subject to the Workers' Compensation Laws of the State of California.

Executed on this 29 day of May, 2012, at Newport Beach, California.



Wendy Marshall, Owner
Messenger Company